BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Application by BellSouth Corp. et al.	)	CC Docket No. 97-208
for Provision of In-Region,	)	
InterLATA Services in South Carolina	)	

REPLY COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

The record overwhelmingly confirms that BellSouth's application does not meet the requirements of Section 271. It has not demonstrated compliance with the competitive checklist, and its operational support systems ("OSS") are wholly deficient. Indeed, BellSouth itself has chosen to ignore those portions of the Commission's "roadmap" that it doesn't like. Thus, for a number of reasons, each of which is sufficient on its own, the Commission should deny the application. In these reply comments, CompTel provides further discussion of two issues which are important not only to the BellSouth application, but also to future applications pursuant to Section 271 of the Act.

First, CompTel explains why it is consistent with the statutory scheme and is pro-competitive to determine that BellSouth is ineligible to apply under Track B of Section 271(c)(1). Track B is a limited exception to the general rule that a BOC demonstrate it has opened its network by demonstrating that it faces actual competition from a facilities-based provider. Track B becomes disabled -- and a BOC must proceed to satisfy Track A -- as soon as a BOC receives a "qualifying request" as interpreted in the *SBC Oklahoma Order*. There can be doubt that BellSouth has received a number of such requests here.

Moreover, the evidence demonstrates that potential competitors are proceeding reasonably toward providing service that satisfies Track A. ACSI and DeltaCom (two carriers specifically identified by BellSouth as potential Track A competitors) both have stated that they soon will be entering the South Carolina market to provide facilities-based service. Both are well within the "ramp-up" period the Commission acknowledged is inherent in the statutory structure created in Section 271.

On the question of whether there is a potential competitor proceeding to serve both business and residential customers, CompTel submits that the evidence adduced in this proceeding demonstrates that potential competitors are proceeding reasonably toward that goal. Both ACSI and DeltaCom (along with several competitors planning to use UNEs to provide service) stated that they were willing to serve residential customers in South Carolina, provided economic conditions permit it. These statements are at least as definitive as the statements credited by the Commission in the *SBC Oklahoma* proceeding, in which it concluded that at least two potential competitors had made qualifying requests. Thus, under the Commission's own precedent, BellSouth should be precluded from applying under Track B.

While it is true that the potential competitors have qualified their discussions by stating that they will provide residential service only if it is economically feasible, this qualification is both rational and reasonable. No competitor can be expected to enter a market if it will be unable to make money doing so. Track B cannot be read to require such a commitment. Further, it is clear that BellSouth is the cause for the uncertainty about whether entry in the residential market is economically feasible. Through its persistent efforts to raise the cost of entering the local market using BellSouth's UNEs and through a number of other obstructionist pricing and policy decisions, BellSouth has created a barrier to entry in the residential local exchange market. It turns the statute on its head to reward BellSouth for such obstruction by enabling it to apply under Track B. In short, Track B can apply only if, *through no fault of its own*, a BOC cannot satisfy Track A. That simply is not the case in South Carolina today.

Second, in the aftermath of the Eighth Circuit's *Iowa Utilities Board* decision, it is critical that the Commission closely scrutinize whether a BOC affords CLECs the practical ability to combine unbundled network elements (including the ability to provide service *exclusively* through network elements) and that it examine whether the access CLECs receive to the network for such purposes is at parity with the access that BellSouth affords to its own local exchange operations. At a minimum, parity of access will require a BOC to commit to developing automated systems to separate and combine UNEs, and providing supervised access to all points on the network for purposes of combining UNEs.

However, BellSouth has not provided the Commission with any meaningful information addressing issues which are integral to the use of UNEs to provide a competing telecommunications service. Until a BOC addresses the threshold question of how it will enable CLECs to combine UNEs and what type of access it will provide for CLECs to combine the elements, the Commission cannot begin to address the sufficiency of the BOC's showing. Accordingly, the Commission should require BellSouth (and future BOC applicants) to explain clearly and completely how it will allow CLECs to combine UNEs and to identify the access it provides to its own local exchange operations for purposes of combining network elements. Such information will give the Commission and interested parties a foundation from which to judge the ability and access the BOC provides for purposes of combining network elements.

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REPLY COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully submits the following reply comments to the application of BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. (collectively, "BellSouth") for authority to provide in-region, interLATA services in South Carolina.

As explained in CompTel's initial comments, and as confirmed by the overwhelming opposition presented by other commenters and the Department of Justice, BellSouth's application should be denied. Not only does BellSouth fail to comply with the "roadmap" outlined by the Commission, it in some instances openly refuses to even attempt to satisfy the Commission's standards. Thus, BellSouth's application is deficient for a number of reasons, any one of which is sufficient to compel denial of the authority requested.

In these reply comments, CompTel provides further discussion of two issues which are important not only to the BellSouth application, but to future applications pursuant to Section 271 of the Act. First, CompTel explains below why it is consistent with the statutory scheme to deny BellSouth's application because it is ineligible to apply under Track B of Section 271(c)(1). Second, in the aftermath of the Eighth Circuit's *Iowa Utilities Board* decision, it is critical that the Commission closely scrutinize whether a BOC affords CLECs

the practical ability to combine unbundled network elements (including the ability to provide service *exclusively* through network elements) and that it examine whether the access CLECs receive to the network for such purposes is at parity with the access that BellSouth affords to its own local exchange operations.

I. POTENTIAL FACILITIES BASED PROVIDERS HAVE MADE QUALIFYING REQUESTS THAT PRECLUDE BELLSOUTH FROM APPLYING UNDER TRACK B

In its application, BellSouth admitted that it had negotiated interconnection agreements with 26 potential competitors, but asserted that the only carriers planning to deploy "self-provided facilities" had failed to take reasonable steps to enter the residential market in South Carolina.[1/] In response to BellSouth's accusations, American Communications Services, Inc. ("ACSI") and ITC DeltaCom, Inc. ("DeltaCom") -- both of whom were specifically identified by BellSouth -- disputed BellSouth's characterization of their efforts to provide facilities-based service in South Carolina.[2/] Both stated that they had firm plans to enter the South Carolina market on a facilities-based basis, and would do so in the near future.[3/] In addition, both stated that they will serve residential customers where it is feasible to do so.[4/]

[1/] BellSouth Brief at 13-15.

[2/] ACSI Comments at 12-15 & Falvey Aff. at ¶¶ 10-13; ALTS Comments at 6-8 & Moses Aff. at ¶¶ 21-22.

[3/] Falvey Aff. ¶ 5 (ACSI will install a local exchange switch in Greenville, South Carolina in the first quarter of 1998); Moses Aff. ¶ 22 ("DeltaCom plans to provide facilities-based residential and business services on a widespread basis in South Carolina in the foreseeable future.")

[4/] Falvey Aff. ¶ 11 (ACSI "will provide facilities-based service to residential callers through multi-tenant dwelling units . . . and shared tenant service . . . providers where it makes economic sense"); Moses Aff. ¶ 22 ("[A]lthough DeltaCom does not provide

CompTel pointed out in its comments that BellSouth ignores a large number of other relevant potential competitors, all of whom had clearly requested access and interconnection that, if implemented, would satisfy Track A.[5/] Several of these carriers produced evidence that they do in fact intend to provide facilities-based service, but effectively have been prevented from doing so by BellSouth's obstructionist tactics.[6/]

The Department of Justice ("DOJ") concluded, however, that it did not have enough evidence to assess whether the potential competitors submitting qualifying requests actually intended to provide facilities-based service to both business and residential customers, and thus did not express an opinion on whether BellSouth is foreclosed from applying under Track B.[7/] Though CompTel, like DOJ, anticipates that the reply comments might provide the Commission with additional evidence on this issue, CompTel submits that the present record sufficiently demonstrates that Track B is not available in South Carolina. The existence of qualifying requests stating an intention to provide facilities-based service disables Track B, subject only to the BOC's ability to revive Track B by presenting specific evidence demonstrating either (i) a failure to negotiate in good faith or (ii) a violation of the terms of an interconnection agreement by a failure to comply (within a reasonable period of time) with the implementation schedule contained in an agreement.

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residential facilities-based services in South Carolina to date, it intends to do so under its South Carolina business plan").

[5/] CompTel Comments at 7-8.

[6/] AT&T Comments at 50; MCI Comments at 8-9; LCI Comments at i; *see* CompTel Comments at 9-13 (BellSouth has erected a barrier to entry in the residential market).

[7/] DOJ Evaluation at 10-11.

A. Track A is the Primary Vehicle for BOC Satisfaction of Section 271

The Commission's interpretation of the two tracks contained in Section 271(c)(1) is clear and apparently not disputed by BellSouth. Under the first track, Track A, a BOC must show that "it is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers," and that such provider or providers are offering those services exclusively or predominantly over their own facilities. 47 U.S.C. § 271(c)(1)(A); *see SBC Oklahoma Order*[8/] at ¶¶ 13-22; *Ameritech Michigan Order*[9/] at ¶¶ 71-104. This standard was regarded by Congress as the primary vehicle for BOC satisfaction of the conditions for the provision of in-region, interLATA services. *SBC Oklahoma Order* at ¶ 41. It is preferable to Track B because "Congress regarded the presence of one or more operational competitors in a BOC's service area as the most reliable evidence that the BOC's local markets are, in fact, open to competitive entry." *Id.* at ¶ 42.

On the other hand, Congress intended Track B "to serve as a *limited exception* to the Track A requirement of operational competition so that BOCs would not be unfairly penalized in the event potential competitors do not come forward to request access and interconnection, or attempt to 'game' the negotiation and implementation process in an effort to deny the BOCs in-region interLATA entry." *Id.* at ¶ 46 (emphasis added). Thus, Track

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[8/] *Application by SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Oklahoma*, Memorandum Opinion and Order, FCC 97-228 (rel. June 26, 1997).

[9/] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Michigan*, FCC 97-298 (rel. August 19, 1997).

B is available *only* if "no such provider has requested the access and interconnection described in [Track A]." 47 U.S.C. § 271(c)(1)(B). As the Commission explained in the *SBC Oklahoma Order*:

> We conclude that Congress intended to preclude a BOC from proceeding under Track B when the BOC receives a request for access and interconnection from a potential competing provider of telephone exchange service, subject to the exceptions in section 271(c)(1)(B) . . .. Thus, we interpret the words "such provider" as used in section 271(c)(1)(B) to refer to a potential competing provider of the telephone exchange service described in section 271(c)(1)(A).

SBC Oklahoma Order at ¶ 34 (footnotes omitted). A potential provider has made a qualifying request sufficient to disable Track B if it is "one that, *if implemented,* will satisfy section 271(c)(1)(A)." *Id.* at ¶ 54 (emphasis in original). Thus, whether a qualifying request has been submitted requires a "predictive judgment" assessed as of the time of the request. *See id.* at ¶ 57.

Track B can be revived after a BOC receives a "qualifying request," but only in two limited circumstances. First, a BOC can demonstrate *to the state commission* (and the state commission must certify) that each potential competitor making a request "failed to negotiate in good faith as required by section 252." 47 U.S.C. § 271(c)(1)(B). Or, the BOC can demonstrate (also to the state commission) that each potential competitor "violated the terms of [an approved agreement] by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement." *Id.* These two provisions safeguard the BOCs' interests if there is "no prospect" of local exchange competition satisfying Track A or if potential competitors "purposefully delay entry in the local market" in order to thwart a BOC application pursuant to Section 271. *SBC Oklahoma Order* at ¶ 55.

The Commission noted two consequences of this statutory structure. First, after a request is made, "there [will] be a period during which good-faith negotiations are taking place, interconnection agreements are being reached, and the potential competitors are becoming operational by implementing their agreements." *Id.* at ¶ 45. This period is inevitable because Congress "recognized that it would take time for competitors to construct or upgrade networks and then to extend service offerings to residential and business subscribers." *Id.* at ¶ 43. Indeed, the Commission acknowledged that there will be a "ramp-up" period "while requesting carriers are in the process of becoming operational competitors." *Id.* at ¶ 41. During such time, Track B is foreclosed and Track A has not yet been satisfied.

Second, by foreclosing Track B when a request is made, but requiring under Track A that the competitor be operational, "Congress created an incentive for BOCs to cooperate with potential competitors in the provision of access and interconnection and thereby facilitate competition in local exchange markets." *Id.* at ¶ 46. This period thus is in fact pro-competitive, for it ensures the BOC has an incentive to see that requests for access and interconnection are "quickly fulfilled." *Id.* at ¶ 57. Track B exists as an alternative only if "*through no fault of its own*, [a BOC is] unable to satisfy Track A." *Id.* at ¶ 55 (emphasis added).

B. BellSouth Has Received a Number of Qualifying Requests That, If Implemented, Would Satisfy Track A

At the outset, it is noteworthy that BellSouth did not attempt to satisfy the *statutory* standard for proceeding under Track B. It does not contend that it *never* received a

"qualifying request" -- nor could it. As CompTel noted in its initial comments, with 26 signed interconnection agreements, there can be no doubt that BellSouth has received one or more requests for access and interconnection that, if implemented, would satisfy the requirements of Track A.[10/] The request is to be evaluated as of the time it is made. At that stage, the *potential* to satisfy Track A is all that is needed.

BellSouth's argument that competitors are not taking any reasonable steps to provide facilities-based service to both business and residential customers[11/] appears to be based upon the final sentence of Section 271(c)(1)(B), which allows for revival of Track B in certain circumstances. But here also BellSouth ignores the statutory standard. It has not alleged that any competitor failed to negotiate in good faith, and did not present such a claim to the state commission. In addition, it does not allege a violation of the *terms* of an agreement it has negotiated, much less evidence that a provider violated the agreement by failing to comply, within a reasonable time, with the express or implied implementation schedule. Indeed, BellSouth has presented no evidence on this point at all -- in its application or before the South Carolina Public Service Commission ("SCPSC"). Neither the Commission nor the SCPSC have been presented with evidence that any specific implementation schedule is contained in BellSouth's agreements, of the requirements of any such schedule, if it existed, or of any failure by a CLEC to comply with that schedule. Instead, BellSouth has made vague allegations aimed toward a hypothetical factor the

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[10/] CompTel Comments at 7.

[11/] BellSouth Brief at 10-13.

Commission indicated it might consider, as if that replaced the words of the statute. These blatant efforts to evade the statute must be rejected.

Moreover, as shown below, even if BellSouth had properly addressed the statutory criteria, the evidence demonstrates that Track B is not available in South Carolina.

1. Several Potential Competitors Have Stated Their Intentions to Provide Facilities-Based Service in South Carolina and Their Willingness to Serve Both Business and Residential Customers

In response to BellSouth's direct attacks on them, both ACSI and DeltaCom presented evidence that they are moving toward providing facilities-based local service in South Carolina. These carriers also demonstrated that they are willing to provide local exchange service to both business and residential customers, if economic conditions permit it.

ACSI stated that in a little more than a year, it completed construction of fiber optic rings in 32 cities and was on track to complete installation of 16 local exchange switches.[12/] Within BellSouth's territory, ACSI already had located switches in five cities.[13/] ACSI states that it currently provides dedicated, facilities-based local services in four separate metropolitan areas in South Carolina, and will be installing a local exchange switch in Greenville, South Carolina in the first quarter of 1998.[14/] With the installation of this switch, ACSI states that it will have "the technical capability to provide facilities-based local

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[12/] Falvey Aff. ¶ 10.

[13/] *Id.*

[14/] *Id.* at ¶ 12.

telephone services to both business and residential customers in all four of its South Carolina markets."[15/]

Moreover, ACSI also stated that, although its business strategy focuses primarily on business customers, it will provide facilities-based service to residential callers where economically possible.[16/] It identified multi-tenant dwelling units ("MDUs") and shared tenant service ("STS") providers as the most likely initial targets for residential service.[17/] In Alabama, ACSI asserts that it already provides facilities-based local services to an STS property that serves residential end-users.[18/] In addition, ACSI states that it entered into an agreement to provide facilities-based service to another CLEC in South Carolina that reportedly serves an existing residential customer base it intends to migrate to facilities-based service.[19/]

DeltaCom states that after obtaining an interconnection agreement with BellSouth earlier this year, it "publicly announced its intention to offer local exchange service throughout its service area, including South Carolina."[20/] Although the details of its business plans were filed as a confidential exhibit, DeltaCom asserts that it is financially committed to providing "wire-line residential and business local exchange services throughout

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[15/] *Id.*

[16/] *Id.* at ¶ 11.

[17/] *Id.*

[18/] *Id.*

[19/] *Id.* at ¶ 12.

[20/] Moses Aff. ¶ 21.

the State of South Carolina, and has been engaged in reasonable efforts to do so for some time."[21] Leaving no doubt as to its willingness to serve residential customers, DeltaCom states that it "plans to provide facilities-based residential and business services on a widespread basis in South Carolina in the foreseeable future."[22]

In addition, as CompTel pointed out in its initial comments, ACSI and DeltaCom are not the entire universe of potential facilities-based competitors that have submitted "qualifying requests" to BellSouth.[23] Several other competing providers claim to be moving toward the provision of facilities-based service in South Carolina. For example, AT&T states that it intends "to serve residential and business customers throughout the region using unbundled network elements, resale and interconnection."[24] Similarly, MCI states that it intends to provide facilities-based local service to residential and business customers, but that BellSouth's noncompliance in Georgia has delayed its plans.[25] LCI, which has a region-wide resale agreement with BellSouth and is providing service in five states in BellSouth territory, states that it intends to enter the South Carolina market and, after an initial period of service resale, "LCI's business plan calls for it to transition as

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[21] *Id.* at ¶ 22.

[22] *Id.*

[23] CompTel Comments at 7-8.

[24] AT&T Comments at 50.

[25] MCI Comments, Henry Aff., ¶ 15.

quickly as possible to providing local exchange . . . service to both business and residential customers [using UNEs]."[26/]

These requests are more than enough to demonstrate that Track B is not available. In the absence of a negotiated implementation schedule setting forth specific obligations and implementation dates (which BellSouth appears not to have negotiated), a potential provider's stated intention to serve business and residential customers is sufficient to require a BOC to proceed under Track A.

Both ACSI and DeltaCom have stated their intention to enter the market on a facilities-based basis, and have indicated that they are willing to serve residential customers. Their requests for interconnection are "qualifying requests," because they have the *potential* to result in facilities-based competition that satisfies Track A. Importantly, in the *SBC Oklahoma Order*, the Commission acknowledged that a "ramp-up" period was inevitable, and noted that, in Oklahoma, less than seven months had passed since the agreements with potential providers had been signed. *SBC Oklahoma Order*, ¶¶ 41-45, 64. By comparison, BellSouth filed the present application 11 months (at most) after the ACSI agreement was

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[26/] LCI Comments at i.

approved[27] and less than six months after the DeltaCom agreement was approved.[28] Both providers are well within a reasonable "ramp-up" period.

DOJ's concern with these providers' plans appears to be that they do not commit unequivocally to providing residential service.[29] It is true that potential providers' statements are tempered by the qualifier that they will serve residential customers only if it is economically feasible to do so.[30] But that is all one could reasonably ask of them. No competitor will enter a market if it does not expect to make money by doing so, and no competitor lacking market power will intentionally serve customers at a loss. For if it did, it would soon be forced out of business.[31] Thus, potential providers' qualifying statements are entirely rational and reasonable. They cannot serve as a basis to revive Track B.

To paraphrase the *SBC Oklahoma Order*, BellSouth has not presented any evidence to suggest that ACSI, DeltaCom or any of the other carriers professing an intent to serve

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[27] ACSI's base agreement was approved on October 28, 1996. *See* BellSouth Application, Appendix B, Tab 9. However, that agreement did not contain prices for unbundled network elements, which the parties initially agreed would be submitted to arbitration. On October 17, 1996, ACSI and BellSouth amended the agreement to resolve the pricing issue on an interim basis. This amendment subsequently was approved by the SCPSC, but the record does not disclose when that approval occurred. Thus, ACSI did not have an approved agreement containing rates until sometime after October 1996.

[28] DeltaCom's agreement was approved on April 3, 1997. *See* BellSouth Application, Appendix B, Tab 27.

[29] DOJ Evaluation at 8-9 & n.14 (commenting that DeltaCom is "silent as to when" it plans to provide residential service and other carriers' statements are "ambiguous").

[30] *See, e.g.,* ACSI Comments at 14.

[31] Like the proverbial businessman that lost money on every sale, one can't "make it up in volume."

business and residential customers will not in fact do so.[32/] BellSouth's attempts to force competitors to declare when and how they will serve residential customers is nothing more than a misguided attempt to use Track B to revive the "date certain" approach rejected by Congress. Carriers do not have to set a specific date by which they will provide service -- and surely cannot be expected to commit to providing service even if it makes no economic sense. If BellSouth were successful in reading such commitments into the Track B standard, BellSouth would need to do little more than wait for that date to arrive to enter the interLATA market, regardless of what it had done to create the foundation for local competition. Although BellSouth would prefer to provide interLATA services before opening its local markets to competition, that is not what Section 271 allows.

2. The Evidence Here is Similar to the Evidence Presented in the *SBC Oklahoma* Proceeding, Where the Commission Found That Track B Was Foreclosed

In the *SBC Oklahoma* proceeding, the Commission found that Track B was foreclosed because at least two carriers -- Brooks Fiber and Cox Communications -- had made "qualifying requests" and were proceeding to enter the Oklahoma market. *SBC Oklahoma Order*, ¶¶ 62-64. The evidence showed that Cox had "stated its intention" to provide services to residential and business customers in Oklahoma. *Id.* at ¶ 64. Brooks Fiber was providing service to some business customers, but was not at that time providing any

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[32/] *See SBC Oklahoma Order* at ¶ 64 ("SBC has provided no evidence to suggest that any of the carriers that have expressed their intent to provide the telephone exchange service described in section 271(c)(1)(A) will not do so").

residential service. *Id.*[33/] Brooks stated that it had "no immediate plans" to commence a general offering of residential services, however. *Id.* at n.194. Rather, Brooks made clear that it was "exploring opportunities" in the residential market, such as through serving multiple dwelling units. *Id.*

The evidence of the progress toward residential services in South Carolina is at least as compelling as that presented by Brooks in Oklahoma, which the FCC concluded was enough to preclude a Track B application. Like Brooks, ACSI and DeltaCom (or other potential facilities-based competitors) may not have detailed plans for when they will enter the residential market. But like Brooks, they are "exploring opportunities" to serve the market -- including through multi-tenant dwelling units, as Brooks was envisioning. Indeed, if anything, ACSI's and DeltaCom's intentions to serve residential customers in South Carolina are even more advanced than was Brooks' at the time of the Oklahoma application. Accordingly, as it did in the *SBC Oklahoma Order*, the Commission should find that Track B is not available in this instance.

3. To the Extent Facilities-Based Entry in the Residential Market is Not Economically Feasible, a Remedy is Within BellSouth's Direction and Control

The policies and purposes of Section 271 make abundantly clear that Track B is to be available to a BOC only when, *through no fault of its own*, Track A cannot be satisfied. *See SBC Oklahoma Order* at ¶ 55. That manifestly is not the case here. To the contrary, the evidence shows not only that BellSouth has utterly failed to satisfy the competitive checklist

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[33/] Although Brooks had begun a test of residential service to four employees, it was only testing its capability to provide *resale* services.

(which by itself discourages competitive entry), but that it has affirmatively erected substantial barriers to competition in residential services.

As CompTel explained in its initial comments, BellSouth has done everything in its power to thwart competitive entry through the use of combinations of unbundled network elements ("UNEs").[34/] BellSouth's refusal to comply with the Commission's unbundling rules while they were in effect and its continued insistence on unnecessary mandatory separation of UNEs have created a cost-barrier that effectively forecloses facilities-based entry to the residential market. BellSouth appears to insist on this separation solely to make it more difficult for competing providers to exercise their rights to combine UNEs in any manner. And its policy has its desired effect. As CompTel showed, without the unnecessary costs imposed by BellSouth's mandatory separation, approximately 85 percent of the residential market would be potentially addressable through the use of BellSouth's UNEs.[35/] However, as a result of the unnecessary costs BellSouth imposes, the addressable market shrinks to as little as 8 percent.[36/] Under these conditions, residential competition is not likely to occur in the foreseeable future.

It is important not to lose sight of Congress' intent to establish Track A as the primary vehicle for satisfaction of Section 271's requirements. Only by strictly adhering to Section 271's structure can the Commission encourage the development of competition in

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[34/] CompTel Comments at 9-13.

[35/] *Id.* at 12 & Gillan Aff. (attached as Exhibit 1 to CompTel Comments). Advances in technology or alternative means of reaching a customer may make other portions of the residential market potentially addressable.

[36/] *Id.*

local exchange services. By foreclosing Track B in all but the most extreme instances, Congress gave the BOCs an incentive to comply with the interconnection and unbundling requirements of the 1996 Act. If the Commission concludes that Track B is not available here, it will send a clear message that BellSouth must do more to encourage the development of competition, and particularly to ensure that residential competition is economically feasible. Make no mistake, these conditions are entirely within BellSouth's control. If BellSouth were to voluntarily commit to providing UNEs in combinations, the artificial barrier it constructed would disappear. Alternatively, if it were to grant CLECs nondiscriminatory access to the network (as it must, but has not yet done), some of the preclusive effects of its mandatory separation policy will be mitigated.[37/] CompTel urges the Commission to stand fast in requiring BellSouth and other BOCs to take the actions necessary to ensure true competition is possible *before* authorizing the provision of in-region interLATA services.

II. BELLSOUTH HAS NOT DEMONSTRATED THAT IT WILL PROVIDE CLECs WITH THE ABILITY TO COMBINE NETWORK ELEMENTS AND NON-DISCRIMINATORY ACCESS TO DO SO

In the aftermath of the Eighth Circuit's decision regarding combinations of UNEs, several issues become critical to evaluating BellSouth's Section 271 application. Under the Eight Circuit's ruling, BellSouth has two choices: it can either provide CLECs with combinations of UNEs *or* it can provide CLECs with both the ability and the access to

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[37/] Commenters have identified other actions by BellSouth that are making residential competition nearly impossible. *See, e.g.,* ACSI Comments at 16-18 (BellSouth must lower loop and other UNE rates substantially, and deaverage rates).

enable CLECs to combine UNEs themselves. Having chosen not to provide access to network elements in their existing logical and functional combinations, BellSouth is obligated to identify how CLECs will be permitted to combine elements, and under what terms and conditions.

However, BellSouth has utterly failed to answer these questions in its application. It has not made any effort to demonstrate that CLECs actually have the ability to combine UNEs, as the Act and the Commission's rules clearly require. It also has failed to describe the access it will provide, much less demonstrate that it provides *nondiscriminatory* access to the network for purposes of combining UNEs. BellSouth's complete failure to submit adequate information regarding CLEC combinations of UNEs amounts to asking the Commission to make a leap of faith on issues that are integral to effective competition in local exchange markets. This the Commission cannot and should not do.

To the contrary, because these issues are so critical to the ability of most prospective providers to enter the local exchange market, the Commission must have answers before it can properly evaluate this or any other BOC application pursuant to Section 271. CompTel respectfully urges the Commission take a closer look at the manner in which BellSouth defines UNEs and at the *access* that it provides to UNEs. It should require BellSouth (and, in future applications, other BOCs) to explain clearly and completely how it will allow CLECs to combine UNEs to provide any telecommunications service of CLEC's design.

A. BellSouth Has Not Demonstrated That it Provides CLECs With the Ability To Combine UNEs

The 1996 Act permits CLECs to purchase UNEs and combine them "in any manner" to provide a telecommunications service. 47 U.S.C. § 251(c)(3). The Eighth Circuit held that under the Act, a competing carrier "may obtain the ability to provide telecommunications services *entirely* through an incumbent LEC's unbundled elements." *Iowa Utilities Board v. FCC*, 120 F.3d 753, 814 (8th Cir. 1997). While BellSouth states that CLECs may combine UNEs as they see fit, it offers only two ambiguous ways to do so in its SGAT, which states:

> CLEC-Combined Network Elements
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> 1. CLEC Combination of Network Elements. CLECs may combine BellSouth network elements in any manner to provide telecommunications services. BellSouth will physically deliver unbundled network elements where reasonably possible . . . as part of the network element offering at no additional charge. Additional services desired by CLECs to assist in their combining or operating BellSouth unbundled network elements are available as negotiated.
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> 2. Software Modifications. Software modifications . . . necessary for the proper functioning of CLEC-combined BellSouth unbundled network elements are provided as part of the network element offering at no additional charge. Additional software modifications requested by CLECs for new features or services may be obtained through the bona fide request process[38/]

Significantly, this language is the *entire text* of BellSouth's description of the manner in which CLECs will be allowed to combine requested UNEs. This bare bones description raises many more questions than it answers and highlights how little BellSouth has done to

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[38/] South Carolina Public Service Commission, BellSouth Telecommunications, Inc.'s Statement of Generally Available Terms and Conditions, *In the Matter of Entry of BellSouth Telecommunications, Inc. into InterLATA Toll Market*, Docket No. 97-101-C, at II.F (Sept. 19, 1997).

ensure CLECs are able to combine UNEs. It clearly does not meet the Commission's requirement that a BOC demonstrate it has a "concrete and specific" obligation to provide UNEs and demonstrate that it is operationally ready to provide such elements. *Ameritech Michigan Order*, ¶ 110. At a minimum, *before* the Commission can begin to evaluate the sufficiency of BellSouth's abilities, it must know what they are. BellSouth has not reached this threshold question.

1. Terms and Conditions

The terms and conditions under which BellSouth would provide requested UNEs remain unknown -- perhaps even to BellSouth. As DOJ noted in its Evaluation, BellSouth's application provides no information as to what UNEs will be provided, the manner in which they will be provided, or the terms and conditions on which they will be offered.[39/] For example, BellSouth does not even describe which elements will be "physically delivered" to the CLEC's collocation space. Although it commits to providing such delivery at no additional charge "where reasonably possible," it does not even begin to address when that will be possible. For those (unspecified) elements that cannot be delivered to a collocation space, BellSouth does not even commit to providing CLECs with the ability to combine the element with another. Instead it offers a wholly undefined -- and completely nonbinding -- "offer" to negotiate additional terms.

CompTel submits that gamesmanship of this nature should not be tolerated. The Commission should order BellSouth to state, clearly and precisely, how it will deliver UNEs

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[39/] DOJ Evaluation at 20-23.

so that CLECs can combine them and to identify *all* of the terms and conditions associated with combinations of UNEs. In addition, BellSouth should be required to demonstrate that, once separated, UNEs can be combined and will work properly when so combined. Unless and until BellSouth provides this information, the Commission should not entertain the application any further.

2. Operational Capability

Even if one were to assume that BellSouth will deliver UNEs and one took it on faith that BellSouth's terms and conditions were reasonable (which one manifestly cannot do on the basis of this application), BellSouth also has not demonstrated that it has the operational capability to provide UNEs in a manner that permits their combination. That is, *whatever* method BellSouth may be employing to deliver UNEs ready for combinations -- which is at this point unknown -- BellSouth must show that it will be capable of delivering UNEs in the manner promised. As DOJ stated, "At least some methods of meeting this requirement would appear to require the development and testing of new capabilities."[40/] BellSouth is obligated to identify what these capabilities are, and to put forth sufficient evidence to demonstrate that it has acquired the capabilities and that they work in practice. Until it does so, the Commission cannot conclude that CLECs are able to combine UNEs.

[40/] DOJ Evaluation at 23.